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8
9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 UNITED STATES OF AMERICA,)

12 Plaintiff,)

13 v.)

14 **CHRISTOPHER JOHNSON** and)
15 **ROBERT KIRSCH,**)

16 Defendants.)

NO. CR 14-00208-BRO

**REPLY TO OPPOSITION TO
MOTION FOR ORDER ALLOWING
ACCESS TO WITNESSES**

(Assigned for all Purposes to Honorable
Beverly Reid O'Connell, United States
District Judge)

MOTION DATE: June 1, 2015
9:00 a.m.

FINAL STATUS
CONFERENCE: June 8, 2015
9:00 a.m.

TRIAL DATE: June 16, 2015
8:30 a.m.

21
22 **I. INTRODUCTION**

23 It is obvious that the right and proper interest of the government in this case is
24 to justly and fairly secure a criminal conviction. What is not so obvious, is that Santa
25 Barbara County also has an interest in this case, in that its legal position in the related
26 civil service appeal will be favorably affected by a conviction.

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28 ///

1 Christopher Johnson's civil service appeal arises out of adverse action taken
2 against him by Santa Barbara County, and involves the very same issues and incidents
3 that are at stake in this case. The Santa Barbara County Counsel represents the Santa
4 Barbara County Sheriff's Department in Johnson's civil service appeal. A felony
5 conviction will profoundly affect Johnson's appeal to the County's extreme
6 advantage, and foreclose his reinstatement.

7 Both the government and the Santa Barbara County Counsel oppose allowing
8 Christopher Johnson freedom of access to witnesses in this criminal case, **that he**
9 **would have had**, but for the filing of a civil action by plaintiff Charles Owens (No.
10 2:14- CV 04149 BRO).

11 12 II. DISCUSSION

13 Respectfully, the Court is asked to decide if the filing of a civil action by the
14 complainant in a criminal case can lessen a **criminal** defendant's constitutional right
15 to present a defense? Further, should a **criminal** defendant's constitutional right to
16 have access to witnesses be in any way restricted because of that civil action -
17 especially when the agency employer arguing against such access will benefit from
18 such restrictions, (i.e., actions that could increase the likelihood the defendant will be
19 convicted). Respectfully, this Court should not countenance interference with the
20 constitutional rights of a criminal defendant by a government agency employer that
21 **is alleging and must prove** that Christopher Johnson committed the charged acts in
22 the collateral civil service appeal.

23 In order to present his defense, Johnson seeks to interview Santa Barbara
24 County Sheriff's Department ("SBCSD") employees who are potential percipient
25 witnesses to the events surrounding the incident that occurred on June 17, 2013,
26 SBCSD employees who are potential witnesses to "use of force" and other relevant
27 training provided to Christopher Johnson by the SBCSD, and SBCSD employees who
28

1 are potential (co-worker) character witnesses on behalf of Christopher Johnson.¹

2 If the complainant in this case had **not** filed a civil action, it is unlikely the
3 Santa Barbara County Counsel would attempt to justify such interference with
4 Johnson's access to these witnesses, or to place restrictions upon such access as to
5 make any such "access" meaningless.²

6 A criminal defendant's **constitutional right** to present a complete defense is
7 safeguarded by allowing access to potential witnesses. Such constitutional rights
8 should not be abrogated or subjugated by a State Bar rule that has no application in
9 this **criminal** matter.

10 A violation of a rule of professional conduct does not give rise to a cause of
11 action, nor does it create any presumption that a legal duty has been breached. (See
12 Rule 1-100.) The rules of professional conduct are designed to provide guidance to
13 lawyers and to provide a structure for regulating conduct through disciplinary
14 agencies. They are not designed to be a basis for civil liability. Furthermore, the
15 purposes of the rules can be subverted where, as here, they are **invoked by opposing**
16 **parties as procedural weapons**. The fact that a rule is a just basis for a lawyer's self-
17 assessment, or for sanctioning a lawyer under the administration of a disciplinary
18 authority, does not imply that an antagonist in a collateral proceeding or transaction
19 has standing to seek enforcement of the rule. Accordingly, nothing in the rules should
20 be deemed to augment any substantive legal duty of lawyers or the extradisciplinary

21
22 ¹It appears that the Santa Barbara County Counsel does not object to Johnson
23 contacting potential "character witnesses", but **only** if they are not "percipient"
24 witnesses or potential witnesses to "use of force" and other relevant training. Since
25 all potential character witnesses would fall under either or both of these exceptions,
such concession is meaningless.

26 ²That is, u
27 nless the same actions were taken because the Santa Barbara County Counsel also
28 represents the Santa Barbara County Sheriff's Department in the civil service appeal.

1 consequences of violating such a duty. (See, the Kutak Commission's recommended
 2 scope for the American Bar Association Model Rules of Professional Conduct.) Rule
 3 1-100 authorizes the rules and standards promulgated by other bar associations to be
 4 considered by this Court.

5 The comments to Rule 2-100 state that the rule does not apply when "a statutory
 6 scheme or case law will override the rule. There are a number of express statutory
 7 schemes which authorize communications between a member and person who would
 8 otherwise be subject to this rule."

9 Here, the United States Constitution itself, and relevant case law, must and does
 10 "override" any State Bar rule that purports to limit a defendant's access to witnesses
 11 in a **criminal** case. The Supremacy Clause renders that proposition axiomatic.

12 The State Bar of California itself has recognized this exception to the rule. On
 13 July 20, 2011, the State Bar submitted a group of proposed Rules of Professional
 14 Conduct to the Supreme Court for approval. Proposed Rule 4.2: Communication with
 15 a Person Represented by Counsel, is substantively similar to the current Rule 2-100,
 16 any changes are inconsequential. Although this proposed Rule will not become
 17 effective unless approved by the California Supreme Court, this Court will benefit
 18 from reviewing the comment section of the proposed Rule, as it addresses situations
 19 that are relevant to **current practice** regarding communication with a represented
 20 person. (The proposed Rule and comments can be found here,
 21 [http://ethics.calbar.ca.gov/Committees/RulesCommission/June25262010MeetingM](http://ethics.calbar.ca.gov/Committees/RulesCommission/June25262010MeetingMaterialsProposed.aspx)
 22 [aterialsProposed.aspx](http://ethics.calbar.ca.gov/Committees/RulesCommission/June25262010MeetingMaterialsProposed.aspx))

23 The comment in proposed Rule 4.2 notes: "Former Rule 2-100
 24 prohibited communications with a 'party' represented by another
 25 lawyer, while paragraph (a) of this Rule prohibits communications
 26 with a 'person' represented by another lawyer. This change is not
 27 intended to preclude legitimate communications by or on behalf
 28

1 of prosecutors, or other lawyers representing governmental
2 entities in civil, criminal, or administrative law enforcement
3 investigations, that were recognized by the former Rule as
4 authorized by law, or to expand or limit existing law that permits
5 or prohibits communications under paragraph (c)(3). This change
6 also is not intended to preclude the development of the law with
7 respect to which criminal and civil law enforcement
8 communications are authorized by law. **Nor is this change**
9 **intended to preclude legitimate communications by or on**
10 **behalf of lawyers representing persons accused of crimes that**
11 **might be authorized under the Sixth Amendment or other**
12 **constitutional right.”** (Emphasis added.)

13 Notwithstanding current Rule 2-100, the “meaningful opportunity to present a
14 complete defense”, as guaranteed by the Constitution, is denied when there is
15 interference with a **criminal** defendant’s ability to secure witness testimony. In this
16 case, defendant Christopher Johnson has been denied freedom of access to interview
17 witnesses by the Santa Barbara County Sheriff’s Office and/or the Santa Barbara
18 County Counsel.

20 **III. CONCLUSION**

21 For all of the above stated reasons, it is respectfully requested that this Court
22 make a finding that there has been interference with Christopher Johnson’s right to
23 freedom of access to witnesses, that such action by a government agency may prevent
24 Christopher Johnson from having a “meaningful opportunity to present a complete
25 defense”, and fashion an appropriate remedy which will allow Christopher Johnson
26 to exercise his rights and have freedom of access to these witnesses without such
27 interference.

1 In this case, Johnson respectfully suggests it may be appropriate for this Court
2 to instruct and order those responsible for the interference to stop such action and
3 refrain from doing so. It may also be appropriate to instruct and order the SBCSD to
4 withdraw the directive issued to its employees not to speak with the attorneys
5 representing Christopher Johnson and/or his investigator, and issue a further directive
6 to these potential witnesses that they are free to discuss the facts and circumstances
7 surrounding this case with the attorneys representing Christopher Johnson and/or his
8 investigator, without restrictions, should they desire to do so.

9
10 Dated: May 29, 2015

STONE BUSAILAH, LLP

11 /s/ Robert Rabe
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13 ROBERT RABE, Attorneys for
14 Defendant Christopher Johnson
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is Stone Busailah, LLP, 200 East Del Mar Boulevard, Suite 350, Pasadena, California 91105.

On May 29, 2015, I served the foregoing document described as **REPLY TO OPPOSITION TO MOTION FOR ORDER ALLOWING ACCESS TO WITNESSES** by placing the true copy(ies) thereof enclosed in sealed envelope(s) addressed as follows

Mary Pat Barry, Esq.
County of Santa Barbara
105 East Anapamu Street, Suite 201
Santa Barbara, California 93101

/X/ VIA MAIL

I deposited the envelope in the mail at Pasadena, California. The envelope was mailed with postage thereon fully prepaid.

/X/ I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Pasadena, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

/ / VIA FACSIMILE

/X/ I caused such documents to be transmitted from facsimile number (626) 683-5656 to the facsimile machines of _____, () _____, prior to 1700 hours on this date. The facsimile machine I used was in compliance with Rule 1003(3) and the transmission was reported as complete and without error. Pursuant to Rule 2205(e), I caused a copy of the transmission report to be properly issued by the transmitting facsimile machine.

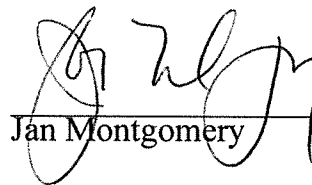
/ / VIA PERSONAL SERVICE

I delivered the foregoing document by hand delivery to the addressee.

//X/ (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/ / (Federal) I declare that I am employed in the office of a member of the bar of this Court at which direction the service was made.

Executed on May 29, 2015 at Pasadena, California.


Jan Montgomery